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IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

ROY B. KEENER, *et al.*,
Petitioners,
v.
WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Respondent.

HOWARD DENNIS, *et al.*,
Petitioners,
v.
WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, *et al.*,
Respondents.

STANLEY WILMES, *et al.*,
Petitioners,
v.
WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF

WILLIAM F. MULRONEY*
PETER VANGSNES
ASHCRAFT & GEREL
2000 L Street, N.W., Suite 700
(202) 783-6400
Washington, D.C. 20036
Counsel for Petitioners

*Counsel of Record

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REPLY BRIEF

I. Applicability of the 1984 Longshore Amendments

A. Respondents' (hereinafter "WMATA") primary argument is that the issue of whether the 1984 LHWCA Amendments apply to District of Columbia cases ". . . is of such limited application that it affects very few cases beyond those presented here." (Resp. Br. 7). WMATA's claim that the issue affects only tort cases is blatantly incorrect. The rationale of the court below had *nothing* to do with the fact that these are tort cases, and there would be no basis whatsoever for a claim by a compensation claimant or employer that somehow the amendments apply to compensation claims, although they do not affect the operation of Sections 4 and 5 of the LHWCA. See, *Higgins v. Hampshire Gardens Apartments, et al.*, BRB No. 83-401 (January 14, 1987) (discussed in Supplemental Brief). Thus, the decision below will not only affect a few hundred tort claims, but will also affect the thousands of 1928 Act compensation cases pending in the District.[1]

WMATA also ignores the effect that the decision will have on federal agencies and the federal courts. Claims arising under the 1928 Act continue to be administered by the United States Department of Labor and appeals continue to be heard by the Benefits Review Board (an independent appellate body within the Department of Labor) and the United States Courts of Appeals. Administration of two versions of the LHWCA will undoubtedly cause administrative chaos. The issue here obviously has an impact far broader than the merely local concerns of the District of Columbia.

WMATA's contention that the issue here is merely one of local law is based on a fundamental misstatement of the nature of the issue. WMATA implies that the issue is merely one of the intent of D.C. City Council. To the contrary, the issue also in-

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[1]Because the Longshore Act provides for lifetime benefits for permanent disability, there are cases pending in which the claimant was injured in the 1940's. Similarly, a worker injured in 1982 will be receiving benefits well past the year 2000 (Pet. for Cert. 12, n. 10).

volves the intent of Congress in 1984, the relationship between the 1928 Act and the LHWCA, and the interpretation of the federal savings statute, 1 U.SC. §109 (1982) (Pet. for Cert. 13-20). See, *Keener v. Washington Metropolitan Area Transit Authority,* 800 F.2d 1173, 1174-75 (D.C. Cir. 1986).

B. WMATA's second argument is that there is no conflict among the courts. To the contrary, the Benefits Review Board has reached a conclusion contrary to that of the court below (Pet. for Cert. 10, 18), and has reiterated both its disagreement with *Keener's* conclusion and the inequity that *Keener* will cause in a decision issued subsequent to the *Keener* opinion.[2]

C. WMATA also argues that he petition should be denied because the decision below was correct (Resp. Br. 9-14). As it has in the courts below, WMATA addresses our argument using the straw man approach – it misstates our argument and proceeds to show why our argument, as misstated, is incorrect. We argued in the petition that the LHWCA continues to apply of its own accord to these cases because the 1928 Act does not incorporate the LHWCA by reference, but rather extends the LHWCA itself to the District. If this analysis is correct, then the 1984 LHWCA Amendments apply to these cases because the repeal of the 1928 Act simply ensured that the LHWCA would not apply to new cases. WMATA's only response is to state the trusim that the LHWCA and the 1928 Act are "wholly separate and distinct statutes." (Resp. Br. 9-10). We do not claim that this is untrue. Our argument is based on the *relationship* between these two statutes. Interestingly, WMATA completely fails to discuss this Court's decision in *Del Vecchio v. Bowers,* 296 U.S. 280 (1935) in this context. As we showed in the petition, *Del Vecchio* directly supports our argument, and directly

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[2]*Higgins v. Hampshire Gardens Apartments, et al.,* BRB No. 83-401 (January 14, 1987). This decision is discussed in our Supplemental Brief and is attached thereto as Appendix B.

contradicts the Court of Appeals' conception of the relationship between the 1928 Act and the LHWCA.

D. WMATA argues that the savings statute preserves only those rights existing at the time of the repeal of the 1928 Act. Apart from the fact that employees *could* sue contractors at the time of the repeal (*Johnson* had not yet been decided), this conclusion ignores *what is being saved.* As we argued in the petition, the savings statute does *not* preserve the LHWCA. (Pet. for Cert. 16-20). If it applies here at all, it applies to preserve the 1928 Act, the statute that was repealed. The 1928 Act does not itself provide *any* substantive rights. Instead it provides that the LHWCA *and all subsequent amendments* apply in the District.

WMATA's argument that our interpretation of the effect of the savings statute renders the repeal of the 1928 Act meaningless is simply not true. Under our interpretation, the amendments would apply to those District cases that continue to be governed by the LHWCA, but the repeal of the 1928 Act would be unaffected. The New D.C. Act would continue to apply with full force to all cases arising after its effective date, and the LHWCA would not apply to any of these cases.

Furthermore, WMATA's concession that the resolution of the issue here hinges on the interpretation of the federal savings statute belies its contention that this case presents merely local law issues. This Court need not and should not defer to the Court of Appeals' "interpretation" (without any discussion or analysis) of the savings statute in this case.

E. Finally, WMATA contends that the Court should deny review because there is no indication that City Council or Congress intended that the amendments be applicable. There are a number of responses to this argument.

First, this argument ignores the fact that neither the Court of Appeal's decision nor the D.C. Court of Appeal's decision in *O'Connell v. Maryland Steel Erectors, Inc.,* 495 A.2d 1134 (D.C. 1985), *cert. denied,* 106 S. Ct. 1378 (1986), was based on

an interpretation of legislative intent. Both decisions were based on the courts' interpretation of the relationship between the 1928 Act and the LHWCA and on the perceived application of the savings statute. Any *lack* of evidence of legislative intent supports the result reached by the Court of Appeals no more than the result we ask this Court to reach.

Moreover, there is substantial evidence that Congress *did* intend that the amendments apply in the District. First, Congress has always made amendments applicable in the District simply by amending the LHWCA, and has never specifically mentioned the District. Second, there is clear evidence that Congress, with respect to the provisions at issue here, intended that the amendments completely undo the change in the law wrought by the *Johnson* decision.[3] Third, there is no rational reason why

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[3] The Conference Committee, in amending Sections 4 and 5 of the LHWCA, stated as follows:

> Third, the substitute addresses that issue of immunity in the situation where an employee of a subcontractor brings a third party action against the contractor for a work-related injury. The Supreme Court in *Washington Metropoltian Area Transit Authority v. Johnson,* 104 S. Ct. 2827 (1984), changed key components of what had widely been regarded as the proper rules governing contractor and subcontractor liability and immunity under the Longshoremen's and Harbor Workers' Compensation Act.
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> * * *
>
> *The Conference substitute also provides a special effective date, so that these amendments apply to pending suits. This will avoid the dismissal, under WMATA, of third-party suits which were pending or on appeal on the date of enactment.* (Any suit which has gone to final judgment from which no lies as of date of enactment would not be subject to the amendments). WMATA, the conferees believe, does not comport with the legislative intent of the Act nor its interpretation from 1927 through 1983. *The case should not have any precedential effect.* (Emphasis added). H.R. Rep. No. 98-1027, 98th Cong. 2d Sess. at 24 (1984)

either City Council or Congress would have wanted to limit the applicability of amendments to the LHWCA. City Council started fresh, with a new law applicable to new claims only. The local District government has nothing to do with either the administration or adjudication of LHWCA claims. The federal system, on the other hand, remains responsible for 1928 Act claims. It is only fair to presume that Congress intended that the LHWCA apply on the same terms nationwide.

In summary, City Council did not, as WMATA claims, "divorce the local workers' compensation system entirely from the Longshoremen's Act." (Resp. Br. 13, quoting *O'Connell,* 495 A.2d at 1141). The LHWCA continues to apply to a large class of cases in the District of Columbia. The issue here is whether the version reflecting the will of Congress and the changing needs of society will apply, or whether the outdated, since changed, version will apply.

II. Reconsideration of Johnson

WMATA's primary argument against our request that the Court reconsider *Johnson* is, once again, based on a complete mischaracterization of our argument. We did not state that this Court . . ." should never have decided *Johnson* in the first place. . ." (Resp. Br. 14). We stated that *if* the analysis of the Court of Appeals concerning the relationship between the 1928 Act and the LHWCA is correct, then this Court should have deferred to the D.C. Court of Appeals' decision in *DiNicola v. George Hyman Construction Co.,* 407 A.2d 670 (D.C. 1979). The Court of Appeals' decision in this case is *premised* on the idea that the 1928 Act merely incorporates the LHWCA by reference, and that the LHWCA itself has no bearing on this case. As we have stated previously, this premise runs directly contrary to this Court's decision in *Del Vecchio v. Bowers,* 296 U.S. 280 (1935).

Our point is that WMATA cannot have it both ways. If *Del Vecchio* remains good law, then the Court of Appeals clearly er-

red, because *Del Vecchio* rejected the argument that the LHWCA itself does not apply in 1928 Act cases. If the Court of Appeals' analysis is correct, then it can only be because *Del Vecchio* is no longer good law. If, as the Court of Appeals held, the 1928 Act merely incorporates the LHWCA by reference, then the *Johnson* decision, a 1928 Act case, did not involve the federal LHWCA at all, and presented only local issues. If this is true, then this Court should indeed have deferred to *DiNicola,* under the principles set forth in *Pernell v. Southall Realty,* 416 U.S. 363 (1974).

WMATA's attempt to maintain inconsistent positions on this issue and the question of the applicability of the 1984 LHWCA Amendments is based on its effort to characterize the *Johnson* issue as somehow federal, while claiming that the applicability of the amendments is at the same time a merely local issue (Resp. Br. 15). If anything, the amendments issue is much more federal in character. As the Court of Appeals acknowledged, this issue involves:

> ". . . the interaction of two workmen's compensation statutes *enacted by Congress,* the repeal of one of them by the District of Columbia . . . a *Supreme Court Decision* . . . and subsequent *Congressional action* designed to reverse the rule enunciated by the Court — all with an eye to . . . a *federal* savings statute. *Keener v. Washington Metropolitan Area Transit Authority,* 800 F.2d 1173, 1174-75 (D.C. Cir. 1986) (emphasis added).

WMATA's argument also ignores the Court of Appeals' decision in *Hall v. C&P Telephone Company,* 793 F.2d 1354 (D.C. Cir. 1986). *Hall,* like *Johnson,* involved interpretation of a provision of the LHWCA in a 1928 Act case. The Court treated the issue as a local question, and thus deferred under *Pernell* principles to a decision of the D.C. Court of Appeals on the same issue. The Court of Appeals in this case, in turn, cited *Hall* for the propositon that the amendment issue was local in nature. *Keener,* 800 F.2d at 1178. Clearly, the Court of Appeals believes

that the two issues are "equally local," and the *Hall* decision stands in direct opposition to WMATA's position that this Court should not defer to *DiNicola.* [4]

Finally, WMATA attempts to argue that *Johnson* did not constitute a departure from prior precedent under the LHWCA (Resp. Br. 15-16, n. 23). This disingenuous assertion claims support from Professor Larson. While Professor Larson does refer to a "marked trend" in favor of contractor immunity, this trend is a legislative one, having nothing to do with the state of the law under the LHWCA prior to *Johnson.* As Justice Rehnquist recognized, such a trend is hardly a justification for ignoring the plain terms of the statute. *Washington Metropolitan Area Transit Authority v. Johnson,* 467 U.S. 925, 941-42 (1984) (dissent).

III. The Contractor Issue

WMATA's response to our argument on this issue essentially ignores, as did the court below, basic principles of summary judgment. Moreover, it is based on an egregious misrepresentation of both the record in this case and the law concerning the meaning of the term contractor in Section 4 of the LHWCA.

In attempting to support the Court of Appeals' inaccurate description of the record in this case as identical to *Johnson,* WMATA passes off an affidavit submitted by petitioners as "irrelevant," stating that it refers to the meaning of the term contractor in the construction industry, not under Section 4. (Resp. Br. 18 and n. 26). In fact, the legal standard is directly tied to the definition of the term in the construction industry and in contract law, and the affidavit specifically addresses the indicia of contractor status discussed in the applicable case law. See, *Director, OWCP v. National Van Lines, Inc.,* 613 F.2d 972, 986-878 (D.C. Cir. 1979), *cert. denied,* 448 U.S. 907 (1980).

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[4]Recently, the Court of Appeals issued its decision on the petition for rehearing in *Hall.* This decision contains a discussion pertinent to the issue presented here, and is discussed in our Suplemental Brief.

WMATA also persists in its claim that the factual matter before the Court in *Johnson* was also present in this case. While WMATA, in its opposition to our motion for summary judgment, *made reference to* the record in the *Johnson* case, it did not incorporate the factual matter in *Johnson* into the record in this case. In fact, it could not have properly done so. Among the record evidence in *Johnson* were depositions taken in that case, which clearly could not be made a part of the record in this case, simply because petitioners here have not had an opportunity to cross-examine the witnesses. The idea that depositions in one case can unilaterally be made a part of the record in a second case is revolutionary to say the least.

WMATA also fails to address our argument that the Court's footnote in *Johnson,* merely deferring to a trial court finding, cannot constitute precedent on the issue. It should not be surprising that petitioners are disturbed that the courts below have deferred to the Court's footnote, where that footnote does not set out the legal standard, does not apply summary judgment principles, and where the record in this case is different.

In summary, the Court should grant certiorari on this issue, both because this issue presents important Rule 56 issues and because this Court has never analyzed the term "contractor" under Section 4 of the LHWCA.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the Petition for a Writ of Certiorari, the petition should be granted.

Respectfully submitted,

William F. Mulroney
Peter J. Vangsnes
ASHCRAFT & GEREL
2000 L Street, N.W.
Suite 700
Washington, D.C. 20036
(202) 783-6400

Counsel for Petitioner

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